No. 382

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

AMBROSE P. McCOY, ET AL
Petitioners

vs.

PROVIDENCE JOURNAL COMPANY, ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOSEPH L. BREEN
Counsel for Petitioners

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit affirming the judgment of the District Court for the District of Rhode Island, permanently enjoining the City Treasurer of Pawtucket, Rhode Island, "and all persons acting under or in concert with him" from withholding certain municipal tax abatement resolutions and lists from the plaintiffs and from preventing them from inspecting those resolutions and lists "at all reasonable times during regular business hours".

Opinions Below

The opinion of the District Court for the District of Rhode

Island is reported in 94 F. Supp. 186. That of the U. S. Court of Appeals for the First Circuit is reported in 190 F.2d 760.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. 1254 (1).

Questions Presented

(1) Whether the statement by the Rhode Island Supreme Court of a general "doctrine" of law relating to inspection of public records was not the law of Rhode Island determining the rights of plaintiffs instead of the statement by an inferior Rhode Island Court (in a case reversed and dismissed on appeal to the State's highest court) of a different "doctrine" on public records.

(2) Whether there was a denial of the equal protection of the laws to these plaintiffs in any matter of right.

(3) Whether the Court of Appeals for the First Circuit should not have followed up its finding that "We think the defendants' motion to strike should have been granted promptly" with a direction to correct that error and strike the complaint.

Constitutional, Statutory and Procedural Provisions Involved

Constitutional Amendment XIV, Sec. 1.

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

R. S. 1979, 8 U.S.C. 43.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rules of Civil Procedure

Rule 8(a)

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to suppor it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

Rule 8 (e)(1)

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

Rule 61

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Statement

The opinion of the United States Court of Appeals for the First Circuit contains the following quoted statement of the circumstances of the case to which has been added a few additional facts apart from quotations.

"The plaintiff, Providence Journal Company, is a Rhode Island corporation engaged in the business of publishing newspapers in the city of Providence which have a wide circulation throughout the state and a substantial circulation in the adjoning city of

Pawtucket. The plaintiff, Sevellon Brown, is the editor and publisher of the Providence Journal Company, and as such is the chief executive officer of that corporation. The plaintiff, Joseph A. Kelly, is a reporter for the Providence Journal Company and the manager of its Pawtucket bureau. Both Brown and Kelly are citizens of the United States and of the state of Rhode Island, Brown being a resident of Providence, and Kelly a resident of Pawtucket, where he, and the Providence Journal Company as well, are also taxpayers.

"The defendant, McCoy, is the Mayor of Pawtucket; the defendant, McAloon, occupies the combined offices of City Treasurer and Collector of Taxes, and the other defendants are the City Clerk, the Assessors of Taxes, and various other executive and legislative officials of that city.

"Stated in general terms the complaint alleges that the defendants, acting individually and in concert, have deprived the plaintiffs of rights guaranteed to them by the Federal Constitution in that they have prevented the plaintiffs from gaining access to certain fiscal records of the city of Pawtucket for the purpose of publication, while permitting others in like circumstances to have access to those records for the same purpose:

"There is no serious dispute as to the basic facts as found by the court below.

"On December 31, 1947, the City Council of the city of Pawtucket, which is a bicameral body consisting of the Board of Aldermen and the Common Council, met in special session and passed a joint resolution abating real and personal property taxes in the aggregate amount of $89,377.12, as set forth in a list of tax abatements submitted by the Board of Assessors of Taxes which was affixed to and made a part of the resolution. Immediately upon adjournment of this meeting the plaintiff Kelly asked the defendant, Donovan, who was the City Clerk and as such the Clerk of the Board of Aldermen, for permission to see the resolution with its appendant list of abatements. Donovan told Kelly to see him 'tomorrow'. Repeatedly during the following weeks

reporters for the Providence Journal Company, and other officers and agents of that corporation, made requests, at first orally and later in writing, of various Pawtucket officials for permission to see the list of tax abatements, but in every instance the request met with postponement, evasion or rebuff."

Of all these Pawtucket city officials only one, the City Treasurer, was positively found to have had custody of any of these records and then only of those for one year. (R. 56). The only request of him was a letter demanding the list of abatements for the years 1942-1947 inclusive. This demand was contained in a sealed letter left at his private office at 3:30 p.m. It was followed by a telephone call at 4:45 p.m. on the same afternoon wherein the caller asked if the demands would be complied with. The answer, also over the telephone, was "No comment". (R. 59).

"Affairs remaining in this state of deadlock, Mayor McCoy on January 21, 1948, at a regular meeting of the Board of Aldermen, announced the release of the 1947 tax abatement list to the Pawtucket Times, a daily newspaper published in the city of Pawtucket which is a competitor in that city of the Providence Journal. And then at the same meeting the Board of Aldermen passed an ordinance providing in pertinent part that 'No city officer, official, agent or employee shall permit any person to examine any tax abatement record or any copy thereof, nor shall any such officer, official, agent or employee disclose the contents of any such record to any person, unless such person has permission of the City Council to examine such record.' This ordinance was passed by the Common Council two days later and the Mayor immediately approved it.

"None of the plaintiffs, and no one else on behalf of the Providence Journal Company either then, or subsequently, applied to the City Council for permission to see the tax abatement record pursuant to this ordinance." The record also discloses that no demand, written or oral, was made of any Pawtucket city official

for inspection of the abatement records, by these plaintiffs, after the passage of this ordinance. (R. 147). "Instead on February 7, 1948, mandamus proceedings on the relation of the plaintiffs herein were instituted in the Superior Court of Rhode Island to compel Mayor McCoy, Treasurer and Tax Collector McAloon, and some of the other defendants, to make the tax abatement record available to the plaintiffs for publication. Thereupon Mayor McCoy immediately called a special session of the City Council for February 9, at which he read the following communication dated February 7, from himself to the Board of Aldermen:

'Gentlemen:

'It has come to my attention that certain attorneys and individuals engaged in the examination of titles find it necessary to examine tax abatement records of the City of Pawtucket. It is also obvious that any member of the public who has proper interest in such records should be permitted to see the same. Clearly, such persons should not be required to seek special permission each time the necessity for the examination of such records arises.

'In addition, it has come to my attention that The Pawtucket Times, a newspaper published in the City of Pawtucket, is desirous of examining these records for the purpose of publication in whole or in part as a public service.

'Accordingly, I have called your Honorable Body to meet in special session at this time (Monday, February 9, 1948 at five o'clock P.M.) to act upon resolutions pertaining to these matters.

Respectfully,

Ambrose P. McCoy,

Mayor.'

"Obviously in response to this letter, the City Council immediately passed two joint resolutions which were approved by the mayor on the same day. In one of these it was resolved first that permission be granted 'to any person himself or through his agent, engaged in the examination of titles or work of similar nature, to examine tax abatement records pertaining to such titles; permission is also granted to any person having an interest in such records which is such as would enable him to maintain or defend an action for which such records can furnish evidence or necessary information, whether such interest is private, capable of sustaining a suit or a defense in his own personal behalf; or capable of sustaining a suit or a defense as the representative of the common or public rights;' and second it was further resolved, 'that no person shall be permitted to examine such records for publication without the express permission of the city council.' In the other it was resolved that permission be granted 'to any duly authorized representative of The Pawtucket Times, a newspaper published in the City of Pawtucket, to examine and copy all tax abatement records for publication in whole or in part.'"

The plaintiffs prevailed in the mandamus proceedings in the Rhode Island Superior Court. Upon appeal, the judgment was reversed and remanded by the Supreme Court of Rhode Island to the Superior Court with directions to dismiss the petition for mandamus. (*Nolan v. McCoy*, 73 A(2d) 693).

Reasons for Granting the Writ

I

The District Court and the Court of Appeals determined that there had been a denial to the plaintiffs of rights established under the law of the State of Rhode Island and hence a denial of the equal protection of the laws under the Constitution of the United States. On the authority of *Fidelity Trust Co. v. Field*, 311 U. S. 169 (1940) and *West v. A. T. & T. Co.*, 311 U. S. 223 (1940) these courts held that a single decision of the Superior Court of Rhode Island established those rights. In ascertaining the law of Rhode Island the lower federal courts considered two opinions of the

Supreme Court of Rhode Island and the above decision of the Superior Court of Rhode Island, an inferior court, which latter decision was reversed and the entire proceeding dismissed by order of the Supreme Court of Rhode Island. This dismissal occurred prior to any decision in either federal court.

The two Rhode Island Supreme Court cases are *In re Caswell,* 18 R. I. 835; 29 Atl. 259 and *Nolan v. McCoy,* —R. I.—; 73 A2d 693. The Superior Court case is the lower court decision in the latter Supreme Court case.

The *Caswell* case involved a newspaper's right to inspect "for publication or otherwise" a judicial record. The Supreme Court, in 1893, in denying any such inspection, stated the law of Rhode Island as follows:

> "At common law, every person is entitled to the inspection, either personally or by his agent, of public records (this term including legislative, executive and judicial records, etc.) provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information . . . As there is no statute in this state, however, regulating this matter, the common law rule above stated, in so far as it is applicable here, is doubtless in force. . . . " 18 R. I. 835, 836; 29 Atl. 259.

Nolan v. McCoy, supra, involved the right of the plaintiffs in the case at bar to inspect the identical tax abatement records herein sought. This was a petition for mandamus originating in the Superior Court. The Superior Court granted the writ, and the pertinent portions of its decision are quoted in the opinion of Judge Hartigan in the United States District Court in this case. 94 F. Supp. 186. This decision of the Superior Court was followed by both federal courts as the law of the State of Rhode Island. The justice of the Superior Court recognized the existence of "the early common law doctrine" as ennunciated in the *Caswell*

case, but repudiated that doctrine, and applied what he considered to be the common law of the "modern American cases." The decision of the Superior Court was appealed to the Supreme Court, where many issues, including the existence of plaintiffs' alleged rights, were argued. That appeal was sustained on numerous grounds, but the Supreme Court saw no necessity for deciding all points "in view of the fact that the writ must be quashed in any event." However, the Court went out of its way, expressly, to reaffirm and recognize the principle of the *Caswell* case. *Nolan v. McCoy*, —R. I.—; 73 A2d 693, 697.

The *Caswell* case lays down but one common law doctrine applicable to all public records, be they legislative, executive or judicial. There is no separate and different rule applicable to non-judicial records. Such is the law of Rhode Island as expounded by its highest court in 1893 and reaffirmed in 1950. It was, therefore, error not to recognize the doctrine of the *Caswell* case as the law of Rhode Island. *Fidelity Trust Co. v. Field*, supra; *West v. A. T. & T. Co.*, supra; *Erie R. Co. v. Tompkins*, 304 U. S. 78.

II

Assuming these plaintiffs were discriminated against, they were discriminated against in no matter of right. The discrimination involved but the extension of favors and courtesies to others. The basic right of these plaintiffs to inspect public records, as that right is recognized in Rhode Island, has not been affected. *In re Caswell*, supra, determines plaintiffs' rights to be conditional and qualified, rather than absolute. No plaintiff has applied to the City Treasurer, defendant McAloon, for the tax abatement records at any reasonable time during regular business hours, and brought himself within the doctrine of the *Caswell* case.

These records have been given to a local newspaper as a matter of courtesy and favor. Plaintiffs complain because they have not been accorded the same favor and courtesies. Although requests were made of various defendants (officials of the City of Paw-

tucket), the only thing most of those defendants could have done was to get the records for plaintiffs as a matter of favor. This, they declined to do. Such cannot be considered a denial of the equal protection of the laws.

III

The Court of Appeals in this case held:

> " . . . It is hard to imagine a pleading more completely at variance with both the letter and the spirit of Rule 8, (e)(1) which requires that each averment of a pleading be 'simple, concise and direct.' We think the defendants' motion to strike should have been granted promptly, whereby the issues might have been clarified for the benefit of all concerned."

However, pursuant to Rule 61 it further decided:

> "However, we cannot say that the complaint is so badly drawn that the defendants, although no doubt handicapped, were prevented from making their defense, or that either we or the court below, although also seriously handicapped, have been wholly prevented from ferreting out the issues lurking in the verbiage."

In this latter regard the court was in error. The one issue which the District Court decided in favor of plaintiffs was not actually in issue under the pleadings. There was no issue raised as to a denial of any plaintiff's rights to inspect public records at the office of the custodian thereof during regular business hours. The issue in this regard, as deduced by the defendants from these prolix pleadings, was whether or not plaintiffs had brought themselves within the doctrine of the *Caswell* case. There being no proper demand and refusal of the custodian for the records it was felt there was no basis for injunctive relief.

Respectfully submitted,

JOSEPH L. BREEN,

Counsel for Petitioners.

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